

1  
2  
3  
4  
5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
7 AT SEATTLE

8 INGE T ANDERSON,

9 Plaintiff,

10 v.

11 UNITED STATES OF AMERICA, *et al.*,

12 Defendants.

NO. C17-0891RSL

ORDER GRANTING IN PART  
DEFENDANT'S MOTION FOR  
LEAVE TO AMEND

13  
14 This matter comes before the Court on "Defendant's Motion for Leave to Amend Answer  
15 and Counterclaim." Dkt. # 86. Plaintiff is suing her former husband to recover amounts owing  
16 under an I-864 affidavit of support and for damages arising out of an alleged failure to provide  
17 financial support during marriage and the intentional infliction of emotional distress.<sup>1</sup> Defendant  
18 answered the amended complaint on October 2, 2018, but most of his affirmative defenses and  
19 counterclaims were dismissed at plaintiff's request. Two of his affirmative defenses – unjust  
20 enrichment and breach of contract/breach of the duty of good faith and fair dealing – were  
21 recharacterized as counterclaims and allowed to proceed, along with his request for declaratory  
22  
23

24  
25 <sup>1</sup> Plaintiff has also alleged claims of "domestic violence" and "battered woman syndrome," but  
26 they do not appear to be viable claims under Washington law. The allegations related to these claims  
are, however, relevant to plaintiff's intentional infliction of emotional distress claim.

1 judgment. The only affirmative defense to survive was one for setoff. Defendant now seeks  
2 leave to amend his answer. Plaintiff opposes the motion on procedural and substantive grounds.

3 **A. Procedural Deficiencies**

4 Plaintiff correctly points out that defendant's motion is overlength and that the proposed  
5 pleading does not indicate where alterations have been made. The Court will not consider the  
6 last three pages of defendant's motion but has considered the proposed pleading.

7  
8 To the extent plaintiff is seeking sanctions under Rule 11, the motion is procedurally  
9 improper. See Fed. R. Civ. P. 11(c)(2). Contrary to plaintiff's argument (Dkt. # 91 at 3), her  
10 motion for default judgment, which was filed two weeks before defendant filed the offending  
11 document, cannot possibly satisfy the notice and safe harbor provisions of Rule 11.

12  
13 **B. Amendment Standards**

14 Pursuant to Fed. R. Civ. P. 16(b)(4), case management deadlines established by the Court  
15 "may be modified only for good cause and with the judge's consent." Rule 16 was amended in  
16 1983 to require scheduling orders that govern pre-trial as well as trial procedure. The purpose of  
17 the change was to improve the efficiency of federal litigation: leaving the parties to their own  
18 devices until shortly before trial was apparently costly and resulted in undue delay. Under the  
19 new rule, once a case management schedule issues, changes will be made only if the movant  
20 shows "good cause."

21  
22 Rule 16(b)'s "good cause" standard primarily considers the diligence of the party  
23 seeking the amendment. The district court may modify the pretrial schedule "if it  
24 cannot reasonably be met with the diligence of the party seeking the extension."  
25 Fed. R. Civ. P. 16 advisory committee's notes (1983 amendment) . . . .

1 Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 609 (9th Cir. 1992). See also Zivkovic v.  
2 S. Cal. Edison Co., 302 F3d 1080, 1087-88 (9th Cir. 2002) (where plaintiff failed to  
3 “demonstrate diligence in complying with the dates set by the district court,” good cause was not  
4 shown).

5  
6 The case management deadline related to amendment of the pleadings is set relatively  
7 early in the case to ensure that the parties have time to serve discovery regarding all of the  
8 claims and defenses at issue. In this case, however, plaintiff lodged an amended complaint just  
9 before the amendment deadline, and there was a delay before the proposed amendment was  
10 accepted by the Court. Defendant timely filed his response and, when the Court found many of  
11 his affirmative defenses and counterclaims deficient, promptly filed this motion to amend. To the  
12 extent the amendments are aimed at remedying the deficiencies identified by the Court,  
13 defendant was diligent once the need for amendment became apparent. One proposed  
14 amendment is not a response to the Court’s order, however, but rather an attempt to introduce  
15 entirely new theories or claims into the case. Discovery has now closed, and defendant has not  
16 explained why these theories or claims were not brought forward in the twenty-two months that  
17 this action has been pending.  
18

19  
20 Satisfying Rule 16’s good cause requirement is only the first hurdle defendant faces.  
21 Under Rule 15, there is a “strong policy in favor of allowing amendment” (Kaplan v. Rose, 49  
22 F.3d 1363, 1370 (9th Cir. 1994)), but “[c]ourts may decline to grant leave to amend . . . if there  
23 is strong evidence of undue delay, bad faith or dilatory motive on the part of the movant,  
24 repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the  
25 opposing party by virtue of allowance of the amendment, or futility of amendment, etc.” Sonoma

1 County Ass'n of Retired Employees v. Sonoma County, 708 F.3d 1109, 1117 (9th Cir. 2013)  
2 (internal quotation marks and alterations omitted). Thus, despite there being good cause for  
3 extending the deadline for amending the pleadings, amendment will still be denied if it is the  
4 product of bad faith, would be futile, or would prejudice plaintiff.  
5

6 **C. First Affirmative Defense: Res Judicata/Claim Preclusion/Issue Preclusion**

7 In defendant's response to plaintiff's motion to dismiss (Dkt. # 53 at 8), he argued that res  
8 judicata was a defense to plaintiff's breach of contract claim. In that context, the Court found  
9 that, despite the fact that plaintiff alleged a breach of the I-864 affidavit and requested  
10 enforcement of those obligations in her divorce petition, there was no indication that the claim  
11 was actually litigated or resolved in the state proceedings. The Court therefore concluded that  
12 the res judicata defense failed as a matter of law.  
13

14 The Court sees no reason to reconsider that conclusion. "To determine whether the  
15 doctrine bars a suit, the Court looks to the res judicata rules of the state from which the original  
16 judgment arises." Li Liu v. Kell, 299 F. Supp.3d 1128, 1132 (W.D. Wash. 2017). In the  
17 Commonwealth of Virginia, the claim preclusion prong of res judicata bars successive litigation  
18 of a claim on which final judgment has been entered, even if new facts or issues could be  
19 brought to bear. The issue preclusion prong bars successive litigation of issues of fact or law that  
20 were resolved in the earlier action and were essential to the judgment entered, even if the issue  
21 subsequently arises in the context of an entirely new claim. Lee v. Spoden, 776 S.E.2d 798, 803  
22 (Va. 2015). No judgment was entered on plaintiff's I-864 breach of contract claim, there is no  
23 evidence that the state court ever mentions or considers that claim, the Marital Agreement that  
24 was incorporated into the state court judgment does not mention the I-864 affidavit, and  
25  
26

1 defendant identifies no issues related to that claim that were necessarily decided in order to enter  
2 the final order of divorce. Neither claim preclusion nor issue preclusion was triggered under  
3 Virginia law.

4 “[U]nder federal law, neither a divorce judgment nor a premarital agreement may  
5 terminate an obligation of support” that “exists apart from whatever rights [a sponsored  
6 immigrant] might or might not have under [state] divorce law.” Erlar v. Erlar, 824 F.3d 1173,  
7 1177 (9th Cir. 2016) (quoting Liu v. Mund, 686 F.3d 418, 419-20 (7th Cir. 2012)). Had the  
8 Virginia court evaluated the merits of plaintiff’s I-864 claim and entered judgment regarding  
9 defendant’s obligations thereunder, res judicata would likely bar relitigation of those issues. But  
10 where, as here, the state court limited itself to applying state divorce law - even with the  
11 incorporation of an agreement which may or may not contain a waiver of the I-864 claim<sup>2</sup> -  
12 neither the divorce nor the waiver abrogate the support obligations defendant undertook for the  
13 benefit of the public.

14 In his motion to amend, defendant makes clear that his res judicata defense applies not  
15

---

16  
17  
18 <sup>2</sup> The Court previously dismissed defendant’s accord and satisfaction and/or waiver  
19 defenses because, pursuant to the form I-864, defendant assured the United States that he would  
20 provide plaintiff with any support necessary to maintain her income at or near the  
21 federal poverty line so that she would not become a public charge. The contract  
22 specified that the obligation to support plaintiff continued until (1) she becomes a  
23 US citizen, (2) she works for approximately ten years, (3) she is no longer a lawful  
24 permanent resident and departs the United States, (4) she obtains a new grant of  
25 adjustment of status based on a new affidavit of support, (5) she dies, or (6) the  
26 sponsor dies. Neither a negotiated settlement nor waiver are included in the list of  
27 events which terminate the support obligation.

28 Dkt. # 81 at 7

ORDER GRANTING IN PART  
DEFENDANT’S MOTION FOR  
LEAVE TO AMEND - 5

1 only to the I-864 claim, but also to the tort claims asserted by plaintiff. Plaintiff's complaint for  
2 divorce and request for support were based upon the same abuse and failure to support  
3 allegations she has asserted in support of her tort claims in this litigation. There is a plausible  
4 inference that, in dissolving the marriage, determining how to allocate the assets and liabilities  
5 associated with the marital community, and resolving the support, alimony, and maintenance  
6 issues under state law, the previous court considered the very same factual allegations that are  
7 offered in support of plaintiff's tort claims. As amended, defendant's res judicata defense is  
8 plausible as to the state law claims.  
9

10 The Court further finds that plaintiff will not be prejudiced by the amendment because the  
11 original defense allegations encompassed both the I-864 claim and the tort claims. Leave to  
12 amend the first affirmative defense to assert that plaintiff's state law claims are barred by the  
13 doctrine of res judicata is therefore GRANTED.  
14

#### 15 **D. Counterclaims**

##### 16 **Contract-Specific Performance**

17 Defendant seeks to add a counterclaim for specific enforcement of a hold harmless and  
18 indemnity provision negotiated between the parties in the fall of 2015. This provision was not  
19 raised in the previous answer, nor was it argued in response to plaintiff's motion to dismiss.  
20

21 Defendant has not explained why he waited so long to identify this provision and assert a claim  
22 thereon: he has not shown good cause for this amendment under Rule 16.<sup>3</sup>  
23

---

24 <sup>3</sup> In the alternative, the Court finds that the proposed amendment to enforce the hold harmless  
25 and indemnity provision would be immediately subject to dismissal and is therefore futile. Nordyke v.  
26 King, 644 F.3d 776, 787 n.12 (9th Cir. 2011). The provision was part of a larger agreement regarding  
the allocation of marital assets and liabilities, in which each party was assigned assets and agreed to be

1                   **Breach of Duties of Good Faith and Fair Dealing**

2                   Defendant seeks to recharacterize his theory that plaintiff negotiated in bad faith and  
3 frustrated the parties' contractual agreement from an affirmative defense to a counterclaim.  
4 While the amendment is not necessary given the Court's prior order (Dkt. # 81 at 3), it is  
5 consistent with that order and will be accepted.  
6

7                   **Setoff**

8                   The proposed amendment clarifies that setoff is asserted as a counterclaim, rather than an  
9 affirmative defense. The defense was previously allowed to proceed. The proposed amendment  
10 will be accepted.  
11

12                   **Unjust Enrichment**

13                   Defendant seeks to recharacterize his theory that plaintiff was unfairly benefitted by the  
14 assistance defendant provided and payments he made during their separation and divorce from  
15 an affirmative defense to a counterclaim. While the amendment is not necessary given the  
16 Court's prior order (Dkt. # 81 at 6), it is consistent with that order and will be accepted.  
17  
18

19 \_\_\_\_\_  
20 solely responsible for any liabilities related to those assets. In paragraph 1.e. of the agreement, the  
21 parties both represent that they know of no other "debts, contracts, obligations or liabilities . . . for  
22 which the other may be liable" and promise that, if such a debt, contract, obligation or liability should  
23 subsequently be discovered, "the party who incurred said debt, contract, obligation or liability shall be  
24 solely responsible" for it and shall indemnify the other. Dkt. # 52-2 at 15. If, as defendant now argues,  
25 this provision were intended to apply to the I-864 obligation, the parties' mutual representations were  
26 false: both parties knew about the I-864 affidavit and both parties had to be aware that it was not  
specifically allocated in the Marital Agreement. By its terms, the provision does not apply to the I-864  
affidavit, however, because it is not a contract for which plaintiff could be liable: the obligations run  
solely from defendant to plaintiff. Further, if the provision has any applicability, it states that "the party  
who incurred said . . . contract" - namely defendant - is solely responsible for its performance. The  
proposed specific performance claim fails as a matter of law.

Defendant restates his declaratory judgment counterclaim.

(1) the affirmative defense of Res Judicata/Claim Preclusion/Issue Preclusion is and remains DISMISSED as to plaintiff's claims arising out of the I-864 application; and

Dated this 17th day of April, 2019.

*Robert S. Lasnik*  
Robert S. Lasnik  
United States District Judge